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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 823

AMERICAN-WEST AFRICAN LINE, INC. and BARBER STEAMSHIP LINES, INC.,
Petitioners
(Claimant and Respondents-Appellants below),

against

"HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, and others,
Respondents
(Libellants-Appellees below).

(CONSOLIDATED CAUSES)

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioners.

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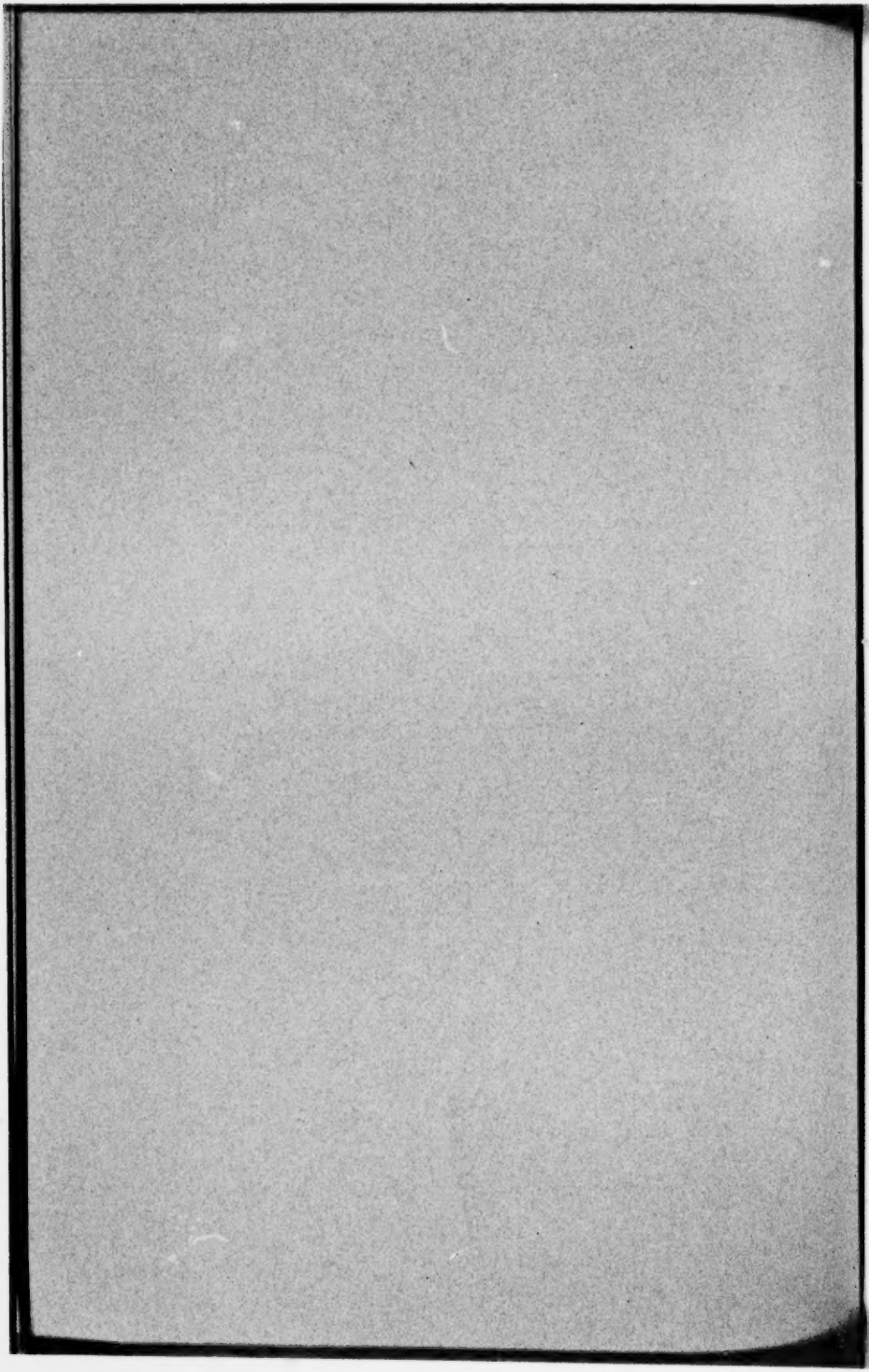
Of Counsel.



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Respondents

(Libellants-Appellees below).

(CONSOLIDATED CAUSES)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that Court entered March 14, 1944 (R. 1276) affirming interlocutory decrees of the United States District Court for the Southern District of New York in favor of the respondents.

Jurisdiction.

The date of the decision of the Circuit Court of Appeals is January 5, 1944 (R. 1269). On January 17, 1944, the petitioners filed a petition for a rehearing and the said petition was denied on February 23, 1944 (R. 1275). The decree of the Circuit Court of Appeals is dated March 14, 1944 (R. 1276). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347(a)) and under General Rule 38 of this Court, Section 5, subdivision (b).

Statement.

These suits (five in all) were brought against the steamer *Otho* and the petitioners, owner and agent of the vessel, respectively, for loss of and damage to cargo carried on the *Otho's* voyage from West African ports to New York, which ended on January 17, 1941. The damages demanded aggregate $514,420, but the bonds for the release of the *Otho* were by agreement fixed at $302,700. The cases were consolidated for the purpose of appeal and the consolidation was extended to include proceedings on certiorari (R. 1277).

The *Otho* sailed from New York on October 31, 1940, on her outbound voyage to Africa. She discharged cargo at numerous African ports and turned around for her homeward voyage at Matadi, Belgian Congo. From there she took on cargo along the African coast and sailed from Freetown, Sierra Leone, for New York on December 27, 1940.

On January 11, 1941, the *Otho* encountered a storm which lasted about four days. It was a storm of wide area, peculiar characteristics and catastrophic violence. Its unusual feature was the high and dangerous seas, which

reached a height of 35 to 40 feet (Smith, R. 234-239). The *Otho* hove to at 4:30 P. M. on January 11th and remained hove to until midnight on the 14th, covering 77 miles during that period (Smith, R. 234, 235, 239).

The ship's launch, 30 feet long and weighing about five tons, which was secured on the forward well deck, was broken in half on January 12th. The forward half was washed overboard immediately and the after half, after pounding around the deck for some time, was finally swept away (Smith, R. 239; Printzlau, R. 456). The big seas also broke a wire reel on the forecastle head, tore away three locking bars over the No. 1 hatch, damaged five sections of pipe guards, displaced the after deck load of logs, carried away the ship's bell and standard, and sprang the bridge deck and forecastle head doors (Smith, R. 239, 240; Printzlau, R. 453-457; Raymond, R. 534-538, 590-594).

On the morning of January 13th it was observed that the *Otho* was down by the head. Following a conference of the officers, Printzlau, the chief officer, examined the forepeak and found no water there, so the natural conclusion was that water was coming into the No. 1 hold (R. 241). Soundings could not be taken as the decks were awash. In an effort to lighten the ship and even her trim, 870 tons of palm oil were pumped out of the deep tanks and 300 tons of water were pumped into the afterpeak tank. This steadied the *Otho* some, but she still was in grave danger (R. 240-242).

The *Otho's* pumps of course could not take care of the great influx of water. Therefore, on January 14th, ten rivets were cut out of the bulkhead separating the forepeak from the No. 1 hold and a three inch line leading from the forepeak to the port double bottom tank was disconnected. This permitted the water to flow from the hold into the forepeak and thence into the double bottom tank where it was pumped out with the ballast pump (Yanez, R. 201).

The master of the *Otho* advised his owners of the ship's peril and the owners summoned aid. The Coast Guard cutter *Mendota* came to the assistance of the *Otho*, arriving at 11:40 P. M. on January 14th and accompanying the *Otho* until January 17th, when the cutter *Champlain* arrived and escorted the *Otho* up to the Ambrose Light vessel. The *Otho* arrived at New York almost 4½ days late (Smith, R. 234-251; Printzlau, R. 453-466; Raymond, R. 534-538; 590-594).

The testimony of the ship's officers as to the severity of the storm was corroborated by third officer Gordon L. Brion of the steamer *Santa Rosa* (R. 206-213), Captain Benjamin Bogdan of the steamer *West Kebar* (R. 407-417), the log books of three Coast Guard cutters, the *Spencer*, *Bibb* and *Hamilton* (Ex. EE.) and by Dr. James H. Kimball, head of the New York office of the United States Weather Bureau (R. 774-804).

The *Otho* was of the Isherwood design, in which the primary shell framing runs fore and aft and the secondary stiffeners vertically. This system of framing is just the opposite of that in transverse ships (Wilson, R. 827).

On the *Otho's* arrival, a fracture 44 inches long was found in her H-3 plate, which was third plate from the stem in the starboard H strake, the strakes being lettered upward from the plate next to the keel plate (R. 129, 130). The fracture occurred just above the fifth longitudinal frame from the bottom of the hold (Sparrow, R. 135-137).

About a year before the *Otho's* voyage, the steamer *Zarembo*, also an Isherwood ship owned by the petitioner, American-West African Line, Inc., met the same kind of an accident as that which befell the *Otho*. The *Zarembo*, while on a voyage from Africa to New York, ran into a storm and went down by the head. Later her starboard G-2 plate was found to be cracked in two places. A suit was brought for cargo damage and the ship-owner cross

libelled for general average contributions. Exactly the same issues were presented there as are presented here.

The District Court held that the accident was due to a peril of the sea and to latent defects in the plate which were not discoverable by the exercise of due diligence. It therefore dismissed the cargo damage libel and granted the carrier a recovery in general average. *The Zarembo,* 44 Fed., Supp. 915 (E. D. N. Y.). The Circuit Court of Appeals for the Second Circuit affirmed the decrees. *Balfour Guthrie & Co.* v. *American-West African Line,* 136 Fed. (2d) 320. This Court denied certiorari on January 10, 1944. *Balfour Guthrie & Co., et al.* v. *Steamship Zarembo,* No. 522, 88 Law. Ed. 375.

The cargo damage in the cases at bar falls into two general categories. The first category consists of the damage to the cargo in the No. 1 hold and tween decks, all caused by salt water which came through the fracture in the plate. It also includes the palm oil which was jettisoned from the deep tanks. The second category embraces the damage to the cargo in places outside of the No. 1 compartments. It is divided into four classes: (1) damage to the residue of the palm oil in the deep tanks through impregnation by salt and fresh water; (2) damage to cargo in the No. 2 tween decks and lower hold by salt water; (3) sweat damage to cargo in the No. 2 tween decks; and, (4) salt water damage to cargo in the bridge deck. Although the jettisoned palm oil was outside of No. 1, it is excluded from the second category as it logically belongs in the first category and will be so treated throughout this petition and brief.

We emphasize the distinction between these two general classes of damage because the law applicable to the first class may not necessarily apply to the second class.

Decisions Below.

The opinion of the District Court is printed on pages 1189-1203 of the record and is reported in 49 Fed. Supp. 945, under the title of *The Otho*. The Court's findings of fact and conclusions of law are printed on pages 1204-1224 of the record. The opinion of the Circuit Court of Appeals is printed at pages 1269-1273 of the record. It is reported in 139 Fed. (2d) 748. *Huilever S. A. etc.* v. *The Otho, et al.*

The District Court indicated that it thought the storm to be a sea peril but did not make an express finding as to this because it concluded that the fracture in the plate had started to develop before the storm (*infra*, p. 25). The same Court, however, in a later case against the steamer *West Kebar*, 1943 A. M. C. 1413, which also was in this storm, held the weather to be catastrophic.

The Court found that the *Otho* was not seaworthy with respect to the H-3 plate when she left New York in October, 1940. It held that in view of her age and the fact that the cracked plate was one of her original plates and that the forward plates of Isherwood ships had developed a tendency about 1937 to crack from deterioration due to corrosion and panting (the weaving of the plates about the longitudinals in a seaway), and in further view of the *Zarembo* accident, the petitioners had not used due diligence to make the *Otho* seaworthy and that the plate fractured as a result thereof (R. 1202).

As to the cargo outside of the No. 1 hold and tween decks the Court's view, judging as best we can from the enigmatic language of its opinion, which was not clarified by its findings, seemed to be that part was due to sea peril and part to unseaworthiness. Because the petitioners had not, at the trial, submitted evidence as a basis of an apportionment of such damage the Court held the ship and the petitioners liable for all of it (R. 1202, 1203). Although

it did not cite *Schnell* v. *The Vallescura*, 293 U. S. 296, it is evident that it had that case in mind.

The Circuit Court of Appeals said that the District Court's finding "that the plate cracked under the stress of ordinary seas and weather because of its weakened and wasted condition from corrosion and panting" was "clearly supportable" (R. 1270). The Court further stated that it could not say that the District Court's finding that the petitioners failed to exercise due diligence to make the *Otho* seaworthy was clearly wrong (R. 1271). It thought that it was not unreasonable for the trial Court to infer from the evidence that the defect in the plate could have been detected by the exercise of greater diligence in examining the No. 1 hold before the commencement of the voyage (R. 1272).

Although the Circuit Court but a short time before had decided *The Zarembo* in favor of the same carrier, its justification for the two opposing decisions on practically the same state of facts was that it could not insure uniformity in the decisions of District Courts on factual issues even though the facts are similar or even virtually identical (R. 1272).

The Court also said that the District Court's findings that the damage to cargo outside of No. 1 was causally related to the fracture are "supportable" and not "clearly erroneous" (R. 1273). Although the District Court's opinion, as we have observed, was very confusing as to liability and non-liability for damage to this particular cargo and although the findings and conclusions were still more confusing, the Circuit Court said that the petitioners could still apportion the damages before a Commissioner (R. 1273). But it laid down no criterion by which an apportionment could be made. In our petition for a rehearing we pointed out the confused state of the record and again questioned the District Court's conclusions as to causal relation with respect to this cargo, but the petition was denied (R. 1275).

Statute Involved.

The statute involved is the *Carriage of Goods By Sea Act*, 46 U. S. C. A. Sections 1300 *et seq.* The pertinent provisions of the Act are as follows:

> Section 4, paragraph 1, (§ 1304-(1))—UNSEAWORTHINESS: Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, * * *. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.
>
> Section 4, paragraph 2 (§ 1304(2))—UNCONTROLLABLE CAUSES OF LOSS: Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (c) Perils, dangers, and accidents of the sea or other navigable waters;
>
> (p) Latent defects not discoverable by due diligence.

Questions Presented.

As to All the Damaged Cargo.

1. Is it proper for a federal Appellate Court to accept a District Court's findings of fact merely on the ground that they are supportable by evidence?

2. Is not the correct rule the one that requires that the trial Court's findings of fact must be supported by the clear weight of the evidence before the Appellate Court is justified in accepting them?

3. Was the Circuit Court's refusal to follow its previous decision in *The Zarembo,* involving virtually the same state of facts as the cases at bar, justifiable on the ground that it was required to accept the trial Court's findings as to latent defects and due diligence, even though opposite to those in *The Zarembo?*

4. Could the lower Court properly decide these cases against the petitioners after deciding *The Zarembo* in the ship-owner's favor?

5. Were not the trial Court's findings of fact clearly erroneous unless supported by the clear weight of the evidence instead of being supported merely by evidence?

6. Was not the District Court's failure to find that the defect in the *Otho* plate was a latent one not discoverable by due diligence clearly erroneous, particularly in the light of the earlier *Zarembo* decision?

7. Were the findings of the lower Courts that the fracture commenced to develop before the storm supported by the weight of the evidence or by any substantial evidence whatever?

As to the Damaged Cargo Outside of the No. 1 Compartments.

8. Is it not necessary under the Carriage of Goods By Sea Act that there be a causal relation between unseaworthiness of the carrying vessel and damage to cargo stowed therein, in order to entitle the cargo-owner to a recovery?

9. Did not the respondents, under the Carriage of Goods By Sea Act, have the burden of establishing that the damage to the cargo carried in places other than the No. 1 hold and tween decks was causally related to the fracture in the H-3 plate?

10. Was any causal relation shown between the fracture in the H-3 plate and the damage to the cargo outside of the No. 1 compartments?

11. Was not the damage to all the cargo outside of the No. 1 compartments proximately due to a peril of the sea?

12. If the cause of the damage which was sustained in the first instance by the cargo outside of the No. 1 compartments was a sea peril and such damage was subsequently aggravated when the vessel went by the head, was not the proximate cause of all such damage nevertheless a peril of the sea?

13. Where cargo has been damaged partly through sea peril and partly through unseaworthiness, is the burden still upon the carrier, in view of the Carriage of Goods By Sea Act, to make an apportionment as between exempt and non-exempt damage in order to avoid being held liable for all the damage?

14. Has the rule of *Schnell* v. *The Vallescura*, 293 U. S. 296, as to the carrier's duty of apportioning the damages between exempt and non-exempt classes, survived the Carrier of Goods By Sea Act in the case of cargo damage partly due to sea peril and partly due to unseaworthiness?

15. Did the lower Courts provide any basis by which an apportionment of the damages could be made in any event? If not, should not the decisions, findings, and conclusions be clarified by defining what is exempt and what is non-exempt damage, to the end that an apportionment can be made?

Specifications of Error to Be Urged.

As to All the Damaged Cargo.

The Circuit Court of Appeals erred:

1. In holding that the District Court's finding that the crack in the plate started to develop before the storm was clearly supportable by the evidence.

2. In holding that the District Court's finding that the petitioners failed to exercise due diligence to make the *Otho* seaworthy was not clearly wrong.

3. In holding that it was not unreasonable for the District Court to infer that the defect in the H-3 plate could have been detected by the exercise of greater care in examining the No. 1 hold before the voyage in question.

4. In failing to follow its previous decision in *The Zarembo,* 136 Fed. (2d) 320.

5. In failing to hold that the findings of fact of the trial Court must be supported by the clear weight of the evidence instead of merely by evidence, in order to justify their acceptance by an Appellate Court.

6. In failing to hold that the findings of the District Court that the defect in the H-3 plate was not a latent one and could have been discovered by the exercise of due diligence were contrary to the weight of the evidence, and therefore clearly erroneous.

7. In failing to hold that the damage to the cargo was due either to a peril of the sea or to a latent defect in the H-3 plate, or both, and to exonerate the petitioners and the *Otho* from any liability therefor.

As to the Cargo Outside of the No. 1 Compartments.

8. In failing to hold that a causal relation between the alleged unseaworthiness of the *Otho* and the damage to

this cargo must, under the Carriage of Goods By Sea Act, appear before the petitioners can be held liable therefor.

9. In failing to hold that the burden of establishing such a causal relation is placed upon the cargo-owner by the Carriage of Goods By Sea Act and that the respondents failed to sustain such burden.

10. In holding that the findings of the District Court that the damage to this cargo was caused or contributed to by unseaworthiness of the *Otho* were supportable.

11. In failing to hold that the proximate cause of all the damage to this cago was a sea peril, regardless of whether such damage was subsequently aggravated by conditions resulting from the fracture in the plate.

12. In failing to exonerate the petitioners from all liability with respect to this cargo.

13. In failing to hold that it was not incumbent upon the petitioners, in view of the Carriage of Goods By Sea Act, to make an apportionment as between exempt and non-exempt damage to this cargo, as a condition of securing exoneration from liability.

14. In failing to hold that the rule of *Schnell* v. *The Vallescura,* 293 U. S. 296, has not survived the Carriage of Goods By Sea Act in cases where cargo damage is due in part to sea peril and in part to unseaworthiness.

15. In failing to hold that the burden of making such an apportionment is now upon the cargo-owner, in view of the Carriage of Goods By Sea Act.

16. In failing in any event to modify the decision and decrees of the District Court so as to define clearly a line of demarcation between exempt and non-exempt cargo damage, as a basis for making an apportionment.

Reasons for Granting the Writ.

1. The Court below, in holding that the trial Court's findings must be accepted, if supportable, instead of holding that the findings, to be accepted, must be supported by the clear weight of the evidence, has rendered a decision which is in conflict with decisions of the Circuit Courts of Appeals for the First and Eighth Circuits, in *Fleming* v. *Palmer*, 123 Fed. (2d) 749 (C. C. A. 1), and *State Farm Mut. Automobile Ins. Co.* v. *Bonacci, et al.*, 111 Fed. (2d) 412 (C. C. A. 8).

2. The Court below, in deciding the present cases in a way directly opposite to its decision in *The Zarembo, supra*, has brought about the anomaly of two opposing decisions in the same circuit on virtually the same facts, which, we believe, necessitates a review by this Court.

3. The Court below, in accepting the conflicting findings of two trial Judges on substantially the same facts has unjustifiably extended the rule as to accepting findings on factual issues by trial Judges.

4. It is desirable that this Court settle the apparent conflict which now exists in the circuits as to whether it is sufficient that the trial Judge's findings be supported merely by evidence or whether they must be supported by the clear weight of the evidence, in order to warrant their acceptance on appeal. The Court here plainly indicated that a finding is acceptable if it has any support in the evidence.

5. Both lower Courts were clearly in error in finding that the crack started to develop in the H-3 plate before the storm.

6. Both lower Courts were clearly in error in failing to hold that the defect in the H-3 plate was a latent one not discoverable by due diligence.

7. It is important that this Court settle the question as to whether the Carriage of Goods By Sea Act changed the law as it was under the Harter Act and now makes it necessary that a causal relation between unseaworthiness and cargo damage exist as a condition of imposing liability for such damage on the carrier.

8. It is important further that this Court decide who has the burden with respect to such causal relation under the 1936 Act; that is, whether the cargo-owner must establish a causal relation or whether the carrier must show the absence of a causal relation.

9. The decision below is clearly erroneous in holding the petitioners liable for all the damage to cargo outside of the No. 1 compartments on the ground that it was caused or contributed to by the unseaworthiness of the *Otho*.

10. The Court below, in failing to hold that the proximate cause of all the damage sustained by the cargo which was in other places than the No. 1 hold and tween decks was due to a peril of the sea, even though the damage may have been aggravated after the *Otho* went by the head, has rendered a decision which is in conflict with the decisions of this Court in the *G. R. Booth*, 171 U. S. 450, *Insurance Co.* v. *Boon*, 95 U. S. 117, *Insurance Co.* v. *Transportation Co.*, 12 Wall. 194, and *Insurance Co.* v. *Tweed*, 7 Wall. 44.

11. These cases also bring up for review the question as to whether, since the passage of the Carriage of Goods By Sea Act, the carrier is required to segregate the damage to cargo due partly to sea peril and partly to unseaworthiness or else be held liable for all the damage under the rule of *Schnell* v. *The Vallescura*, *supra*. The further question arises as to whether the burden of making such a segregation is not now upon the cargo-owner in view of the 1936 Act.

12. Although the Circuit Court agreed with the District Court that the petitioners were not liable for some of the

damage to the cargo outside of the No. 1 compartments, it refused to establish a criterion by which an apportionment could be made, as a result whereof the petitioners have no guidepost for the making of an apportionment, if the burden is still upon them to do so. This error should be corrected by this Court on a review by certiorari.

WHEREFORE, your petitioners, referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said consolidated causes may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, March 24, 1944.

AMERICAN-WEST AFRICAN LINE, INC.
BARBER STEAMSHIP LINES, INC.
Petitioners,

By JOHN W. CRANDALL,
Counsel for Petitioners.